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Diversified Holdings, L.C. v. Gilbert R. Turner, Richard M. Knapp, University Properties, Inc., a Utah Corporation, the Haws Companies, a Utah Corporation, dba the Haws Companies Real Estate Services, Robert M. West, Jr., and John Does 1 through 4 : Reply Brief

Utah Supreme Court

D. Miles Holman; Jeffrey N. Walker; Holman & Walker, LC; Attorneys for Appellants.
Blake S. Atkin; Jonathan L. Hawkins; Atkin & Hawkins; Attorneys for Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH
450 South State Street, Salt Lake City, Utah 84111

DIVERSIFIED HOLDINGS, L.C., Plaintiff and Appellee and Cross Appellant, vs. **GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah Corporation, THE HAWS COMPANIES, a Utah Corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR., and JOHN DOES 1 through 4,** Defendants and Appellants and Cross Appellees.	Supreme Court No. 20000730 Priority No. 15

REPLY BRIEF OF APPELLANTS

Appeal from an Judgment of the Fourth Judicial District Court in and for Utah County, State of Utah
Honorable James R. Taylor, District Court Judge

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INTRODUCTION

"Choices have Consequences"[1]

On a recent Saturday afternoon, one of my 14 year old twins came into my den and asked what I was working on. I replied that I was writing a brief to the Utah Supreme Court.

"Why the Utah Supreme Court?" he asked.

Taking my reading glasses off and swiveling my desk chair around to him, I paused before answering. "Well, son, the Utah Supreme Court has the final word on cases that started in a lower court. In the case I'm working on, the lower court made certain rulings that we believe need to be further reviewed."

"Why?" he pressed.

"The lower court's primary responsibility is to sort out 'what' happened – to resolve factual disputes. The Utah Supreme Court's primary responsibility is to make sure the right laws are applied to those facts."

"Why can't the lower court just apply the right law?" he reasoned.

"In most cases the lower court has and the case ends with that court's determination. However, in some cases it is not clear how the law should be applied."

"Why is that?"

"Well, you have to understand that as a lawyer one of my jobs is to sort out the consequences of someone's choices. You know we have talked a lot lately about choices and consequences. The same applies here. The law provides us with the rules that govern those consequences. However

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[1]The following is an actual conversation that the author (Jeffrey N. Walker) had with his son, Chase, on Saturday afternoon, September 29, 2001.

at times, there is a gap in the law as to what the consequences should be in a particular situation. When this happens, we look to the courts to clarify what the law should be."

"Is that what you are asking the Utah Supreme Court to do in your brief?"

"Exactly. This case involves the sale of a building. My client made some false representations to the buyers about how much he was making on the sale. The buyers found out about these misrepresentations after they bought the building. While my client offered to give the buyers their money back, the buyers wanted to keep the building, but demanded that my client give some of the money back. My client refused and the buyers sued."

"How do you know who is right?" he continued, now sitting cross-legged on the floor.

"Luckily for the parties this deal was written down. So, what we do is look at what the parties agreed to in writing to determine what the consequences of my client not telling the truth about how much he was making and the consequences of the buyer deciding that they wanted to keep the building anyway."

"What does the law say?"

"That is where it gets a little tricky. You see there is law that deals with this kind of situation generally, but there is a gap in the law as to how it applies in these specific circumstances."

"How?"

"In this case the written contract for the sale of the building contained a provision that said that only the terms in the written contract were binding on the parties and that anything said before the contract was signed, if it isn't in the contract, is not part of the deal."

"So."

"Well, the contract does not contain anything about what my client was going to make on the deal. When the contract was prepared the buyers did not require anything to be written about limiting what my client was going to make. "

"Why didn't the buyers write in the contract that your guy agreed to only make so much?"

"That's a good question. They could have, but for whatever reason they didn't. The law tells us that when someone lies to get someone to take a deal the victim has two critical options. First, he can rescind, or undo the deal – get his money back and give back whatever he had bought. If he undoes the deal and he has been damaged because of the deal he can sue for damages outside of the contract. This is because the contract was undone and is therefore gone. Or, second, he can affirm, or keep what he had bought under the contract. If he keeps the deal the contract remains in place and the only remedies the person has are those remedies found in the contract itself."

"Well, what happened at the trial? What did the lower court say?"

"The trial court found that the buyers not only could keep the building, but also get the difference between what my client said he was going to make and what he actually made."

"But, I thought you said that if the buyers kept the building they couldn't get anything that wasn't stated in the contract?"

"That's right. And so we have taken this case to the Utah Supreme Court to review how the lower court applied the law. We think that once the buyers chose to keep the building they lost the right to get any of their money back because that was not included in the agreement."

"What do you think the Utah Supreme Court is going to do?"

"I think they are going to fill in that gap in the law and correct the lower court's ruling."

"I hope so."

"So do I."

ARGUMENT

I. THE "ELECTION OF REMEDIES" ISSUE WAS PROPERLY PRESERVED AT THE TRIAL.

The issue pertaining to the application of the "election of remedies" in the present case was raised a every critical juncture of this case at the trial level. It was first raised by way of a motion for summary judgment by appellants. Appellants moved for summary judgment over the issues as to whether appellees, having chosen to affirm the Ernest Money Agreement, could seek the damages for fraud, as sought. This motion was denied, not on the basis of the sufficiency of the evidence, but as a matter of law. Thereafter, at the end of the trial, appellants moved the trial court for a directed verdict. This request was denied.

After the trial, appellants again in post-trial fashion moved for a judgment notwithstanding the verdict over this very issue. At that time appellee attempted to derail the further consideration of this issue. However, the trial judge rejected appellee's attempt allowing appellants to both fully brief and argue this issue during the post-trial phase of this litigation.[2]

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[2]The trial judge accepted then defendants' position that under Rules 50, 51 and 60 of the Utah Rules of Civil Procedure that this issue had been sufficiently preserved or otherwise was appropriate for post-trial consideration. This ruling was in complete accord with this Court's reasoning in Henderson v. Meyer, 533 P.2d 290 (Utah 1975). The Henderson case involved a truck/automobile accident. The jury found in favor of the defendant truck driver and the plaintiff automobile driver appealed. This Court held that the evidence at the trial supported a claim of negligence on the truck driver. However, the plaintiff did not seek a directed verdict at trial and the defendant argued that as a consequence the plaintiff could not seek such relief on appeal. This Court disagreed noting:

> The law is to the effect that one who does not move for a directed verdict generally has no standing to urge on appeal that the evidence does not support the judgment. However, an exception exists where plain error appears in the record and it would result in a miscarriage of justice to affirm the judgment.

Id. at 291-92.

The Henderson court reversed the judgment and remanded the case to have the judgment in

(continued...)

Utah law is clear that in order to preserve an issue for appeal it must be presented at the trial level. As discussed above, this requirement was clearly met. In Lebaron & Assoc. v. Rebel Enters.,

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[2](...continued)
favor of plaintiff entered and to have a trial on damages. Id.; see accord Price v. Sinnott, 460 P.2d 827 (Nev. 1969); Wright & Miller, 9 Federal Practice and Procedure, § 2536 at 593 (1971).

The Henderson court further referred to Rule 51 in support of its ruling. Rule 51 provides that objections to jury instructions are not required for appellate review in the court's discretion and in the interest of justice. This reference to Rule 51 appears appropriate, and has been used by other courts in allowing for such post-trial relief. For example, in DuPont v. Pressman, 679 A.2d 436, 439 n.4 (Del. 1996), the Delaware Supreme Court held that such post-trial relief was available "if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing." Id. The Dupont court, in a factual circumstance very similar to the present, ruled:

> DuPont's motions for summary judgment and directed verdict did not rest on evidentiary insufficiency. Rather, DuPont argued that the governing legal standard in Delaware simply did not allow a cause of action in these circumstances. Since DuPont's position with respect to the law did not prevail in the trial court, DuPont was left to craft proposed instructions which stated what the trial judge thought the law to be. . . . Accordingly, DuPont has preserved the issue for appeal purposes.

Id.; see accord St.Louis v. Praprotnik, 485 U.S. 112 (1988); Wright & Miller, Federal Practice and Procedure, § 553 at 411 (1971).

The trial judge found that this reasoning was directly applicable in the present case. Furthermore, the trial judge relied on Rule 60(b)(1) that permitted the trial court, in its discretion, to relieve a party from a final judgment if that party demonstrates "mistake, inadvertence, surprise, or excusable neglect." The Utah Court of Appeals in Udy v. Udy, 893 P.2d 1097, 1099 (Utah App. 1995), succinctly held that "a mistake of law by the trial court may support a Rule 60(b) motion." (Numerous citations omitted). Similarly, in Bischel v. Merritt, 907 P.2d 275, 277(Utah App. 1995) ruled:

> Rule 60(b)(1) provides a trial court may relieve a party of a judgment in case of mistake. A judicial error or mistake of law by the trial court may support a Rule 60(b) motion. Trial courts have discretion to determine whether a mistake of law existed, and we will reverse only if there has been an abuse of that discretion. Under the facts of the present case, we conclude a mistake of law existed; therefore, the trial court abused its discretion when it denied Bischel's rule 60(b) motion.

For the same reasoning as discussed above, Rule60(b)(1) provided the trial court with an additional basis to consider the issue pertaining to the effect of the "election of remedies" issue.

823 P.2d 479 (Utah App. 1991), the Utah Court of Appeals stated that "[t]o preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits." Id. at 483 (citing Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); See also James v. Preston, 746 P.2d 799, 801-02 (Utah App. 1987)).

Appellee offers no case whatsoever to support its position that the "election of remedies" issue was not preserved for appeal. Utah case law clearly holds that in cases with a fact scenario similar to the case at hand, issues raised, presented, argued and ruled upon post-trial are preserved for appeal. See, e.g., State v. Belgard, 830 P.2d 264, 265-66 (Utah 1992)(holding that issues raised and dealt with in post-trial evidentiary hearings are preserved for appeal); State v. Matsamas, 808 P.2d 1048, 1053 (Utah 1991)(holding that because the trial judge took evidence on and ruled upon a challenge to hearsay evidence at trial--even though the objection was not timely raised--the issue was preserved for appeal). It is clear that in this case, as in Belgard and Matsamas, the trial court had the opportunity and chose to take evidence and fully hear the arguments raised.

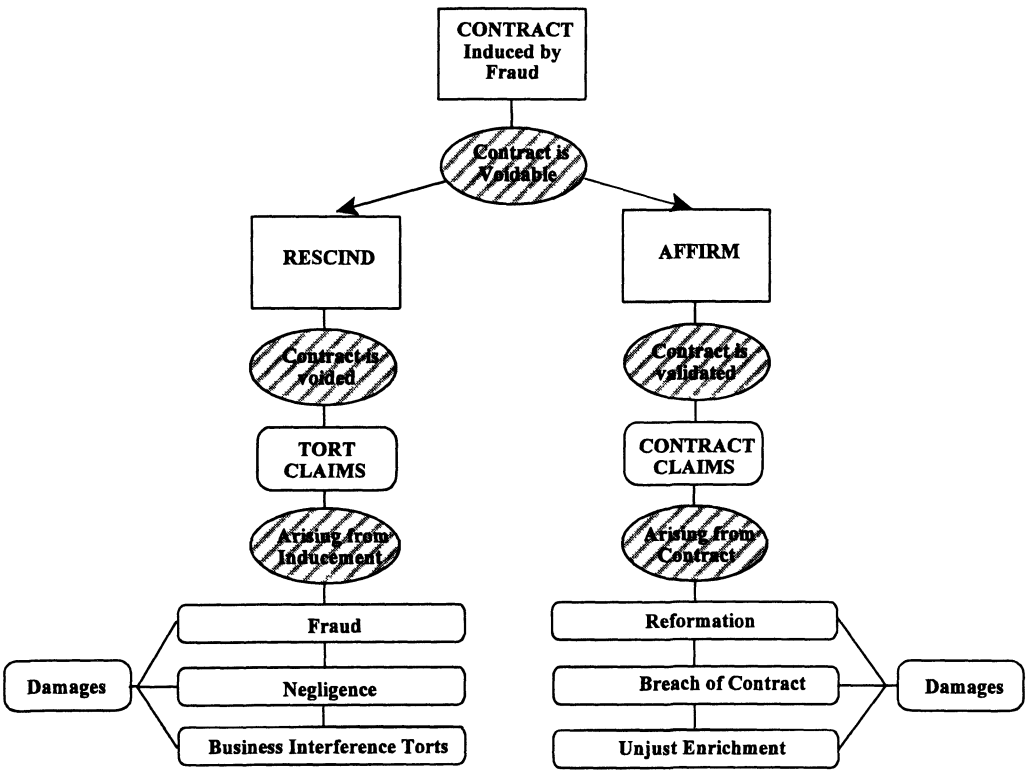
By allowing appellants to present the merits of the issue, brief the issue, argue them in a hearing, and making a ruling on the merits, the trial court effectively made way for these issues to be considered on appeal.

II. APPELLEE FAILS TO UNDERSTAND THE PROPER INTERPLAY OF A MERGER CLAUSE OVER FRAUD CLAIMS IN A CONTRACT ACTION WHERE THE CONTRACT IS AFFIRMED RATHER THAN RESCINDED.

This issue is of first impression with this Court. Yet, substantive supporting law already exists. The law in Utah, and virtually in every state too, is that a party who claims to have been fraudulently induced into a contract has the choice of either rescinding or affirming the contract. Perkins v. Coombs, 769 P.2d 269, 271 (Utah App. 1989); Conder v. A.L. Williams & Associates,

Inc., 739 P.2d 634, 639 (Utah App. 1987). This right belongs to the aggreived party because the alleged fraud makes the contact voidable, not void. See,e.g., Wilkinson v. Carpenter, 276 Or. 311, 554 P.2d 512, 519 (Or. 1976)("The contract containing such a provision [a merger provision] is voidable and itself subject to rescission"). The choice is up to the party alleging the fraudulent inducement whether to rescind or affirm the contract. If the contract is rescinded, the contract is voided and the claims lie in tort, as no contract legally exists. If, on the other hand, the contract is affirmed, the contract is deemed valid and the party can sue for damages. The damages in the latter case must be derived from the contract, as the contracting party chose to affirm, or validate the contract. A contract claim may exist to reform a fraudulent term or condition of the contract.

The following diagram depicts this analysis:



For example, a seller fraudulently represents to a buyer that he has 25 acres to sell for $10,000 per acre when he knows that he only has 10 acres. A contract is drawn up noting that the

purchase price is $250,000 for 25 acres. Afterwards, the buyer learns that the seller knew that he only had 10 acres to sell. The amount of acreage available is a material factor in the transaction. At that point, the buyer has the choice to rescind the contract and get back his $250,000 and other damages, including those in tort. If, on the other hand, the buyer decides that he wants to keep the property, he can affirm the contract and still sue to have the contract reformed to correct the fraudulent representation. This requires looking to the contract to determine what reformation is necessary to correct the terms so as to redact the fraudulent misrepresentation. In this example, the reformation would include the difference between the 25 acres, as represented by seller, and the 10 acres that were actually sold. This is what is referred to as the "benefit of the bargain" damages.[3]

Yet, this is not what happened in the present case. What we have here is that appellee entered into the Ernest Money Agreement to buy the Office Building from appellant University Properties. Appellant Turner orally misrepresented pertaining to how much the seller was making on the sale and also failed to disclose appellant Knapp's professional duties as a real estate agent. These misrepresentations were not reduced to writing and were never made part of the contractual terms between the parties. In essence, appellee determined that these representations (at least pertaining to how much appellants were making on the sale) were not material to its decision on whether to buy or not. The transaction closed and shortly thereafter appellee learned that appellants Turner and Knapp made an extra approximately $72,000 on the deal and were licensed real estate agents. With this information, appellee had (arguably) the choice to either seek recession of the contract and seek damages in tort to punish these appellees for their misrepresentations or affirm the contract and seek damages resulting from the contract. Appellant chose to affirm the agreement,

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[3]This example is essentially the factual predicate of Dugan v. Jones, 615 P.2d 1239 (Utah 1980), as more fully discussed herein.

thereby keeping the Office Building. Having made that choice, this Court must then look to the contract to determine what damages for the misrepresentation exists.[4]

Appellee's representations to this Court that appellants have attempted to mislead this Court in the applicable law to this scenario is without merit. Rather, appellants are simply asking this Court to look at the applicable law to rule on this scenario. Even a cursory review of appellee's legal support and analysis evidences the flaw in their reasoning. As more fully discussed herein, appellee has cited no cases, and indeed appellants propose that none exist, to abrogate the legal analysis employed by appellants in justifying its reasoning and analysis.

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[4]When appellee made the choice to affirm the contract it also chose the remedies it could receive. Appellee has, however, attempted to get remedies from that choice, as well as from the choice not taken. That was the flaw in the matter before the trial court. Choices do have consequences. That legal truth is exhibited in a non-legal context. We draw the Court's attention to the poem by Robert Frost,"The Road Not Taken," as set forth below:

Two roads diverge in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;
Then took the other, as just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,
And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.
I shall be telling this with a sign
Somewhere ages and ages hence:
Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.

A. Dugan v. Jones, 615 P.2d 1239 (Utah 1980) Does Not Support Appellee's Position That A Party Who Affirms A Contract Can Also Sue For Fraud Independently From The Terms Of The Affirmed Contract.

Appellee argues that Dugan v. Jones, 615 P.2d 1239 (Utah 1980), stands for the proposition that when a party chooses to affirm a contract that was entered into based on fraudulent misrepresentations, they can sue for damages that were not part of the contract. The Dugan opinion simply does not support that argument. In the Dugan case, a buyer purchased 22 and 3/4 acres. The property was described as including over 12 acres of native pasture and over 8 acres of irrigated improved pasture. The written sale agreement specifically noted that the property being sold included 22 and 3/4 acres. After the closing, the buyer discovered that only 6.9 acres were actually conveyed or were for sale and stopped paying the seller. Seller thereafter commenced a foreclosure action over the property. The buyers countersued for damages based squarely on the contractual misrepresentation over the acreage, as specifically noted in the contract.

This Court held that the buyer could seek damages that would include the diminution in the value of the property actually bought (this Court ordered the trial court to use the "benefit of the bargain rule" id. at 1247), consequential damages as a result of not getting what was represented to be sold (id. at 1250), and punitive damages if these contractual misrepresentations were proven to be fraudulent (id. at 1246). ***However, all of the damages allowed by this Court were those that were squarely found in the contract that the buyer affirmed.***

Accordingly, the Dugan v. Jones stands for the legal proposition that a party who affirms a contract may thereafter sue for damages for misrepresentations contained in the contract so affirmed. It does not stand for the proposition that a party who affirms a contract can thereafter sue for misrepresentations that never became part of the final contract that was affirmed.

B. The Cases Cited By Appellee Pertaining to Merger Clauses Do Not Support Its Argument That Such Clauses Have No Application To Cases Where The Contract Is Affirmed Rather Than Rescinded.

Similarly, appellee's attack that appellants have mislead this Court in arguing that a merger or integration clause becomes important in a suit alleging fraud for an affirmed contract is equally misplaced. Appellee cites a myriad of cases in illusionary support that a merger clause which specifically notes that all prior oral or written representations are superceded by the affirmed contract does not preclude claims for fraud for oral misrepresentations never noted in the terms of the affirmed contract. Yet, not one of them actually supports this position.

Instead, the Utah case law cited by appellee merely bring greater clarity to the validity of appellants' position.[5] For example, the following cases cited by appellee merely stand for the legal

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[5]Appellants have fully discussed the legal support for their position in this regard in their principal brief filed with this Court. In summary, when a party chooses to affirm a contract, that party in essence, wants to be bound by the contract, and seek enforcement of the contract and the recovery of any damages thereunder. In this context, merger clauses effectively bar the introduction of prior representations, good or bad, honest or misleading. See, e.g., Marowitz v. Wieland, 2000 WL 306751 (Ga. App. March 27, 2000); Homestead Development Corp. v. Ayres, 244 A.D.2d 928, 928, 665 N.Y.S.2d 240, 240 (N.Y.A.D. 4 Dept. 1997); Crown Pontiac-GMC, Inc. v. McCarrell, 695 So.2d 615, 618 (Ala. 1997); Nelson v. Elway, 908 P.2d 102, 107 (Colo. 1995).

The rationale for such a requirement was aptly articulated in Paden v. Murray, 240 Ga. App. 487,489, 523 S.E.2d 75, 68 (1999):

> Where a party who is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a ***recognition of the transaction***, or acts in a manner inconsistent with a repudiation of the contract, ***such conduct amounts to acquiescence, and, though originally impeachable, the contract becomes unimpeachable in equity***.(Emphasis added).

Therefore, "[d]epending upon which of the two actions is ultimately pursued, the presence of a merger clause in the underlying contract may be determinative as to the successful outcome. ***If the defrauded party has not rescinded but has elected to affirm the contract, he is relegated to a recovery in contract, and the merger clause will prevent his recovery.*** If, on the other hand, he does rescind the contract, the merger clause will not prevent his recovery under a tort theory." Cotton v.

(continued...)

position that a merger or integration clause does not prevent a party to ***rescind*** based on fraud in the inducement. See, e.g., Ong Intern. (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993) (Case involved the ***rescission*** of two contracts and tort claims for damages, including punitive damages); Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634 (Utah App. 1987) (Case involved the ***rescission*** or termination of an employment contract and the bringing of tort claims against the employer for fraudulently inducing the employee to take the job in the first place); Berkley Bank for Cooperatives v. Meibos, 607 P.2d 798 (Utah 1980) (Case involved a group of dairymen's attempt to have certain promissory notes ***rescinded*** based on fraudulent misrepresentations by the cooperative).

Other Utah cases cited by appellee supports the findings in Dugan v. Jones, supra, that if a contract is affirmed, claims can be brought for damages ***specific to the contract terms***, including fraud claims. See, e.g., Lamb v. Bangart, 525 P.2d 602 (Utah 1974) (Claims for damages over misrepresentation of terms contained in an affirmed contract affirmed).[6]

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[5](...continued)
Bank South, 231 Ga. App. 812, 813-814, 499 S.E.2d 129 (1998) (emphasis added). See accord Pennington v. Braxley, 224 Ga. App.344, 346-47, 480 S.E.2d 357 (1997); Estate of Sam Farkas, Inc. v. Clark, 517 S.E.2d 826, 829 (Ga. App. 1999); Danann Realty Corp. v. Harris, 157 N.E. 2d 597, 599 (N.Y. 1959).

[6]Appellee's citation to Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), deserves special consideration. In this case buyers of a farm brought suit against the seller for alleged fraudulent misrepresentation. In remanding the case in part, the Court found that the buyers were not justified in relying on certain "misrepresentations" despite the finding that they were so justified by the jury. The Court reasoned:

> "[T]he picture [of the subject land in dispute] shows that the land was covered with rocks up to the size of a man's head and it was obviously rocky that if the plaintiff's had taken the trouble to walk over it, the most casual of inspections would have shown that it was not good for cultivation. Parrish [the seller] did nothing to actively prevent the Paces [the buyers] from making an inspection and it would have been little trouble to do so. ***Under these circumstances, we believe that it must be said***

(continued...)

Furthermore, appellee spends a significant amount of time citing cases to which appellants have no legal objection – cases which simply stand for the well-established premise that a merger or integration clause does not prevent the introduction of fraud to seek ***rescission*** of the contract, to excuse performance under the contract, or to reform contractual terms.[7] Interesting, but not

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[6](...continued)

as a matter of law that the plaintiffs did not use reasonable care and diligence. They were, therefore, not entitled to rely on the representation . . . ."

Id. at 146.

This analysis and conclusion seems applicable to the present case. One is compelled to ask, whether appellee used "reasonable care and diligence" when they never even asked to see the contract they knew existed between appellant University Properties and the bank for the Office Building?" For had they done so either appellants Turner and Knapp would have perpetuated the lie or disclosed the true terms. Either way, appellee would have learned that they did not know the whole story.

[7]The following cases were cited by appellee that support this well-recognized legal premise that a merger clause does not preclude the admissibility of evidence of fraud which makes a contract voidable or provisions unenforceable: Sperau v. Ford Motor Company, 674 So. 2d 24 (Ala. 1995) (Court affirmed a parties right to rescind a purchase of an automotive business based on alleged fraud in the inducement); Keller v.A.O. Smith Harvestore Products, Inc., 819 P.2d 69 (Colo. 1991) (Court allowed a party to sue for negligent misrepresentation for being wrongfully induced to purchase an inoperative grain storage systems); Agristor Leasing v. Saylor, 803 F.2d 1401 (6th Cir. 1986) (Court allowed a buyer to bring a counterclaim for recession against a seller for fraud in the inducement in buying a faulty animal feed storage system); Moffatt Enterprises, Inc. v. Borden, Inc., 807 F.2d 1169 (3rd Cir. 1986) (Court stated that a contract for the manufacturing of insulation was voidable if induced by fraud); Salkeld v. V.R. Business Brokers, 549 N.E. 2d 1151 (Ill. App. 1989) (Court ruled that merger clause in franchise agreement did not preclude the admissibility of evidence of fraudulent misrepresentations made in inducing the franchisee to enter into the franchise agreement where franchisee sought to rescind or terminate the same); Ferrell v. Cox, 617 A.2d 1003 (Ma. 1992) (Court allowed parole evidence to establish that language in utility easement was too broad); Vmark Software, Inc. v. EMC Corp., 642 N.E.2d 587 (Mass. App. 1994) (Court ruled that merger clause did not prevent proof that computer software didn't operate as promised and therefore a basis to rescind the license contract); Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302 (Minn. 1993) (Court allowed a fraud claim to exist outside of the contours of an employment contract that contained a merger clause); Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 820 P.2d 1323 (N.M. 1991) (Court affirmed that merger clause did not prevent evidence of fraud justifying recession of lease in a shopping mall); Chase v. Columbia National Corp., 832 F.Supp. 654 (S.D.N.Y. 1993) (Court ruled that evidence of fraud in the inducement of a stock purchase (continued...)

surprising, ***not a single case*** cited by appellee rebuts the legal premise that when a contract with a merger clause ***is affirmed***, evidence pertaining to alleged fraud in the inducement is not relevant. The contract which was voidable was affirmed.

Thus, the critical issue for this Court to answer is what provisions in the ***affirmed contract*** (the Earnest Money Agreement for the Office Building) does appellee claim were fraudulent. The answer must be a resounding – none. Once affirmed, the relevant question is whether the terms under the Ernest Money Agreement are fraudulent. A review of the material terms is telling:

- ✓ Was appellant University Properties really the seller? ***Yes.***
- ✓ Was appellee Diversified or its predecessor really the buyer? ***Yes.***
- ✓ Was the Office Building misrepresented (e.g., smaller, larger, etc.)? ***No.***
- ✓ Did appellee Diversified pay $775,000 for the Office Building? ***Yes.***
- ✓ Did appellant University Properties have the right to sell the Office Building? ***Yes.***

As these questions evidence, under the ***affirmed*** terms of the Ernest Money Agreement, no fraud was involved, and no corresponding damages exist.

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[7](...continued)
agreement would allow either recession or reformation of the contract); Lance v. Bowe, 648 N.E.2d 60 (Ohio App. 1994) (Court ruled that evidence of fraud was admissible to reform the terms of a home purchase to reflect representations that basement did not leak when it did); Gilliland v.Elmwood Properties, 391 S.E.2d 577 (S.C. 1990) (Court held that contract for architectural services was voidable based on alleged fraudulent misrepresentations); Silva v. Stevens, 589 A.2d 852 (Ver. 1991) (Court affirmed that parole evidence pertaining to representations made pertaining to condition of the home noted in the contract that the home was constructed to the "strictest standards" despite "as is" provision); Stemple v. Dobson, 400 S.E.2d 561 (W.Va. 1990) ("As is" clause did not prevent claims of fraud in the inducement in the sale of a home); Richey v. Patrick, 904 P.2d 798 (Wy. 1995) (Court ruled that an "as is" clause would not prevent contract for the condition of a well to become *void ab inito* if seller failed to disclose true condition of well); Grube v. Daun, 496 N.W.2d 106 (Wis. 1992) (Court ruled that "as is" clause did not protect against affirmative misrepresentation in real estate transaction for purposes of damages and recission).

Now, that is not to say that appellants did not do anything wrong, as appellee is so alleging we are proposing. Fundamental wrongs occurred. Appellant Turner lied about how much appellant University Properties had to pay for the Office Building. Appellant Knapp discovered the lie and failed to correct it. These appellants were wrong. These wrongs may have been sufficient for appellee to sue for recission.

Additionally, appellants acted unprofessionally by failing to properly disclose that they were both licensed real estate agents. These wrongs subjected them to professional discipline – both appellant Turner and Knapp either lost or gave up their professional licenses over this transaction.

Yet, these wrongs, as critical they were, do not vest appellee with unlimited legal claims. But that is truly what appellee received from the trial court. It got to keep the Office Building and reap the undisputed financial increase of the deal. It also got to sue as if it had rescinded the deal and punish the sellers for selling them the Office Building fraudulently. Of course they like what they received. But, the law simply should not allow such "double dipping" to stand.

III. IF PUNITIVE DAMAGES ARE AWARDED, THE PUNITIVE AWARD REMITTED IS FLAWED IN BOTH THE AMOUNT AWARDED AND THE METHODOLOGY USED TO ALLOCATE THE AWARD.

The central issue before this Court over the punitive award is whether the trial court properly allocated the punitive award amongst the joint and several defendants. This issue is of first impression before this Court. While this Court has discussed the limits and criteria that should be examined in determining the amount of a punitive award, it has never addressed the issue of how such a punitive award should be allocated between joint and several defendants. It is this direction that appellants seek by appeal.

A. A Punitive Award Must Be Rationally Related To The Compensatory Award.

This Court in Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991) articulated seven factors in the determination of a punitive award.[8] In reviewing this determination, it is important to place in context the awarding of punitive damages generally. Punitive damages can only be awarded in circumstances where "wilful and malicious" conduct or "reckless indifference" to others occurs. See Crookston, supra, 817 P.2d at 807; Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 117, 1186 (Utah 1983); Rugg v. Tolman, 39 Utah 304, 117 P. 54, 57 (1911). Further, the placing of another's life or physical safety in extreme jeopardy is the most likely factor in enhancing the amount of the punitive damage beyond the recognized ratios. Mere economic loss would not enhance the amount of punitive damages beyond ordinary standards. See, e.g., Grimshaw v. Ford Motor Company Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 388 (1981); Ford Motor Co. v. Havlick, 351 So. 2d 1050, 1050 (Fla. App. 1977). In the present case, the issue on appeal is not whether appellants deserved a punitive award against them, but what is the appropriate amount of such an award.

While seven factors were noted, any careful reading of this Court's analysis and resulting guidance in this area , results in concluding that the seventh factor of looking at the amount of the actual damages award is most prominent. In this regard this Court's direction is unambiguous. This Court directed:

> Among the seven factors we have repeatedly listed that should be considered in determining the amount of a punitive damage award is the "amount of actual damages." E.g., Bundy, 692 P.2d at 759. . . . The punitive damage awards we have characterized as violating this "reasonable and rational" relationship rule have been labeled "grossly disproportionate" to the actual damages awarded and have been said

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[8]Appellants have fully discussed the application of each of these factors to the present case in their principal brief. Accordingly, appellants incorporates by reference this discussion for purposes of contrast to appellee's discussion of the same in its brief.

> to be the result of passion or prejudice. These awards have been either reduced by this court directly or remanded to the trial court for further proceedings. See, e.g., Jensen v. Pioneer Dodge Center, Inc., 702 P.2d 98, 101 (Utah 1985).

Id. at 810.

This Court continued in this regard:

> The general rule to be drawn from our past cases appears to be that where the punitives are well below $100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000,we have indicated some inclination to overturn awards having ratios of less than 3 to1.

Id.

In an economic setting, as in the present, when the ratio between compensatory and punitive damages is greater than 3 to 1 the award has been presumptively seen as excessive and the product of bias and prejudice. VanDyke v. Mountain CoinMachine Distributors, Inc., 758 P.2d 962,965 (Utah App. 1988). In such circumstances a ratio of 2 to 1 or 1 to 1 or perhaps even less (i.e., ¾ to 1 or ½ to 1) is more appropriate. As noted by the VanDyke court:

> Because of the limited number of cases considering large awards [in an economic damage setting], . . . it is safe to say that these large awards appear to receive more scrutiny than the smaller awards and the acceptable ratio appears lower. See, e.g., Van Hake v Thomas, 705 P.2d 766, 772 (Utah 1985) (Steward, J., concurring and dissenting) (majority opinion upholding $500,000 punitives – 1 to 1 ratio); Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1113 (Utah 1985) (Stewart, J., concurring and dissenting) (majority upholding $200,000 punitives – ½ to 1 ratio). In one such case, when the ratio exceeded 2 to 1,we reduced the award on the grounds of excessiveness. See First Security Bank v. J.B.J. Feedyards, 653 P.2d 591, 598-99 (Utah 1982) (reducing $100,000 punitive – 3 to 1 ratio – to $50,000 – 2 to1 ratio).

Id. at 810

It is this factor that we ask this Court to further consider in the present case. In ruling on appellants' Motion for New Trial, the trial court agreed that the punitive award was grossly disproportionate to the compensatory damages, noting simply that it was "excessive." This initial

award of $5,130,500.00 was ***69.8*** times the size of the compensatory damages of $71,336.00. The trial court then went on to determine what was the proper ratio between the compensatory damages of $71,336.00 and a punitive award.

It is at this juncture in the trial court's reasoning that we are asking this Court to re-consider. In looking at this seventh element, the trial court looked at each defendant, concluding as follows:

Defendant	Damages	Punitive Award	Ratio
Turner	**$71,336.00**	**$208,257.00**	**2.9 to 1**
Haws	**$71,336.00**	**$130,500.00**	**1.8. to 1**
University	**$71,336.00**	**$214,000.00**	**3 to 1**
Knapp	**$71,336.00**	**$500,000.00**	**7 to 1**
TOTALS:	**$71,336.00**	**$1,052,757.00**	**14.75 to 1**

Yet, as further discussed below, using this methodology still resulted in the punitive award being nearly 15 times greater than the compensatory damages. Under any analysis used and accepted by this Court, this ratio must still be viewed as excessive.

Ironically, appelle argues that there was no evidence before the trial court that the verdict was a result of passion or prejudice. However, in First Security Bank v. J.B.J. Feedyards, 653 P.2d 591, 599 (Utah 1982), this Court stated that:

> [W]here it appears that such an award resulted from passion or prejudice rather than reason and justice, this Court must not permit it to stand. In the absence of evidence in the trial record evincing such passion or prejudice, ***such may be shown by the excessive amount of the punitive damages award itself.***

(emphasis added); see also Bundy v. Century Equip. Co., 692 P.2d 754, 758-759 (Utah 1984); Van Dyke v. Mountain Coin Machine Distr., Inc., 758 P.2d 962, 965 (Utah Ct. App. 1988).

Clearly the excessiveness of the verdict is prima facie evidence that there was passion or prejudice involved. This Court has established a standard for an acceptable award. In Crookston v. Fire Ins. Exch., 817 P.2d 789, 811 (Utah 1991), the Court stated:

> [W]e find that guidelines emerge for trial courts faced with challenges to punitive damage awards on the grounds of excessiveness under rule 59(a)(5). ***If the ratio of punitive to actual damages falls within the range that this court has consistently upheld, then the trial court may assume that the award is not excessive.***

(emphasis added).

It follows then, that if the ratio of punitive to actual damages is outside the generally accepted range, the court may assume that the award is excessive. This assumption is accompanied by the presumption that the award is due to passion or prejudice.

In this case, the original verdict awarded by the jury far exceeded the realm that the Supreme Court has found acceptable. In fact the punitive damages determined by the jury were nearly seventy times the actual damages and can be clearly presumed to be excessive and the result of passion and prejudice. While the number of Utah cases examining awards exceeding $100,000 is more limited it is safe to say that the larger the award the more scrutiny the court places on it and the acceptable ratios tend to be smaller. See Von Hake v. Thomas, 705 P.2d 766,772 (Utah 1985) (upholding $ 500,000 punitive damages: 1 to 1 ratio); Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1113 (Utah 1985)(upholding $ 200,000 punitive damages: 1/2 to 1 ratio). In First Security Bank the court reduced a ratio of more than 2 to 1 on the grounds of excessiveness. See First Security Bank v. J.B.J. Feedyards, 653 P.2d 591, 598-99 (Utah 1982) (reducing $100,000 punitive damages: 3 to 1 ratio, to $ 50,000: 2 to 1 ratio).

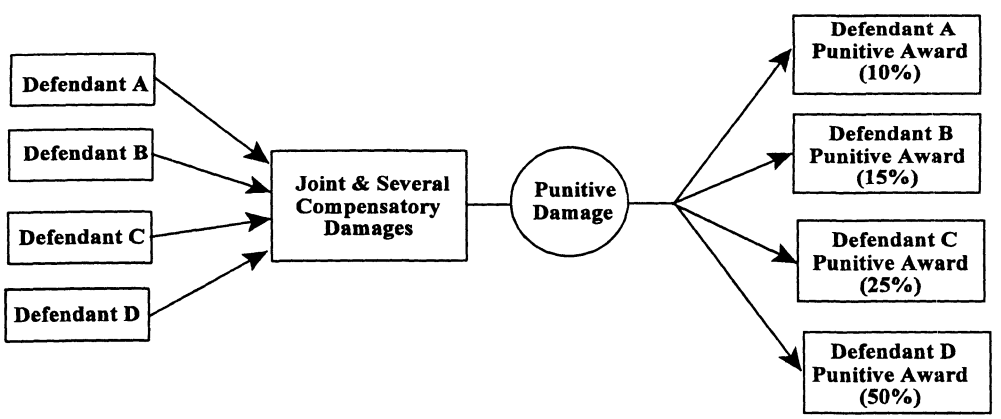
An award in the range set forth by the jury in this case was excessive on its face. And no other evidence is necessary of the passion and prejudice. The trial judge was correct so finding, but stopped significantly short of remedying the error.

B. A Punitive Award Must Be Allocated Consistent With The Joint and Several Compensatory Damages.

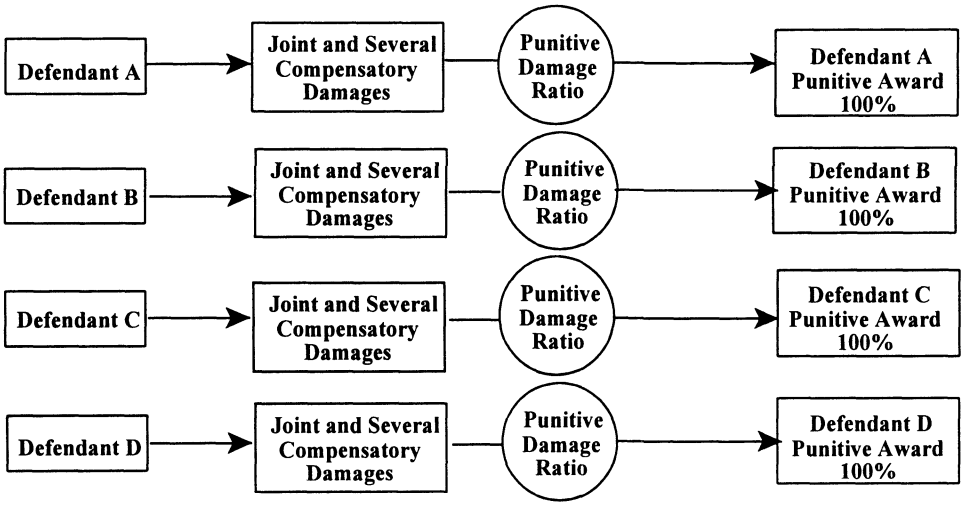
In the present case four defendants were found to be ***jointly and severally*** liable for $71,366.00 of compensatory damages. At trial, while the compensatory damages were joint and several, the court even determined the relative obligation amongst the guilty defendants, namely: Turner: 19.782%; Knapp: 47.494%; University: 20.328%; and Haws: 13.386%.

As joint and several defendants, appellant Diversified is able to collect its compensatory damages of $71,366 against any of the defendants. However, appellant Diversified can only collect once for such damages. It is not able to collect the $71,366 ***four times***. Similarly, the punitive award must also be viewed in the aggregate. The central question to be asked then is what does the compensatory damage justify in terms of a punitive award. In other words, the punitive award must be supported by the compensatory damages. This reasoning is in accord with this Court's instructions and guidance in Crookston, supra.

The following diagram depicts this methodology:

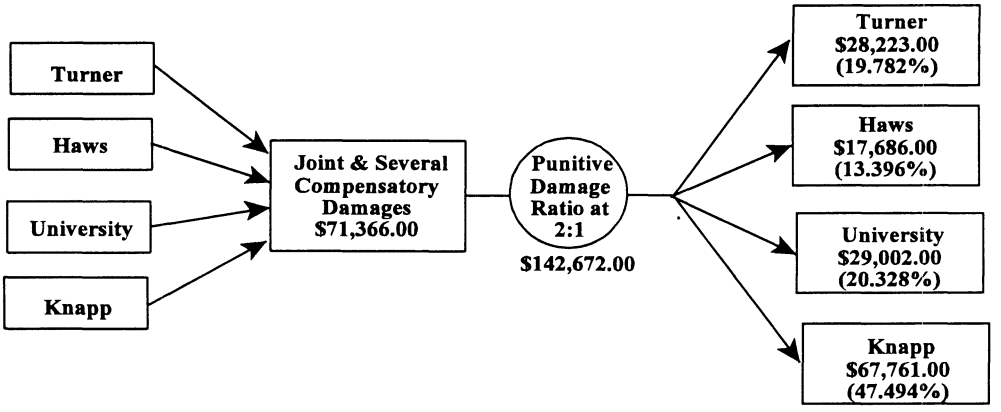


This methodology is consistent with the trial courts finding of joint and several liability and then determining the percentage of fault attributable to each of the four defendants for purposes of punitive damages. If this were not the case, why make any allocation of fault if all damages (both compensatory and punitive) were not joint and several? Unfortunately, while the trial court properly started down this course of analysis, in the end it abandoned it. Instead, the trial court mixed its reasoning of joint and several compensatory damages with independent punitive awards. This mixed methodology can be depicted as follows:



This methodology is obviously flawed. Under this methodology, there would be a premium paid for joining as many separate defendants as possible, so as to artificially leverage the available punitive award. The more defendants, the higher the punitive award. Such an approach would effectively eviscerate the prominent seventh factor as articulated in Crookston, supra.

Instead, the proper methodology under Crookston is to determine just how much the compensatory damage award can support in terms of a punitive award. Once this determination is made, then the Court can allocate that punitive award to the various defendants. In the present case, such a methodology, would be depicted as follows:



By employing this methodology, the trial court is able to properly apply the various factors delineated by this Court in calculating the appropriate level of punitive award attributable to the damages caused. It is this clarification that appellants are asking this Court to provide.

IV. APPELLEE'S CROSS-APPEAL OF THE NEGLIGENCE AWARD IS NOT PERMITTED, AS A MATTER OF LAW.

The rule of law in this situation is clear. "A remittitur gives the plaintiff a choice. He [or she] can refuse to accept the reduced amount of damages and instead proceed to a new trial." Wright & Miller, 11 Federal Practice and Procedure § 2815 (1995). In Terry v. Zions Cooperative Mercantile Institution, 605 P.2d 314, 326 (Utah 1979), this Court stated that, "[w]here the party who moves for the reduction, i.e. the defendant, institutes an appeal of the lower court proceedings, the plaintiff should be free to cross-appeal the amount of remittitur, notwithstanding the fact that he has previously accepted the reduced amount."

The situation before this Court with regard to the negligence judgment, however, is different. Appellant Knapp did not appeal the amount of the negligence damages as remitted in any

way. And this choice was certainly reasonable as the trial court carefully articulated the basis and extent that such negligence damages could be supported by the evidence presented at trial.

The appellee now wants this Court to consider evidence that simply cannot support any augmentation of the negligence award. The appellee raises such issues of the negligence damages for the first time on its cross appeal. Essentially, appellee received the benefit of not retrying the matter on this issue of negligence and still wants to appeal the propriety of a remittitur which it accepted at the trial level.

In Dalton v. Herold, 934 P.2d 649 (Utah 1997), this Court examined the propriety of a plaintiff appealing a remittitur. Quoting the U.S. Supreme Court, this Court concluded that "the generally accepted rule provides that a party who accepts a remitted amount ***cannot*** thereafter appeal the propriety of the remittitur order." Id. at 326 (citing Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (emphasis added)).

In Donovan, supra, the plaintiff accepted a remittitur under protest and later attempted to appeal the remittitur. However, the U.S. Supreme Court noted that, "[a] line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed," Id. at 649. The Court further held that "a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." Id.

This Court analyzed the decision of the Donovan court, and determined that "a properly accepted remittitur or additur is analogous to a settlement agreement. It is a consent decree. The Utah Rules of Appellate Procedure provide that appeal may be taken from a final judgment, but they do not contemplate appeal from a consent decree. Utah R. App. P. 3(a) (1996)." Dalton at 650.

The United States Court of Appeals for the 10th Circuit concluded that

> By accepting remittitur of damages in lieu of a new trial, the plaintiff has accepted the benefit of not having to undergo the rigors, risks, and costs of a new trial in exchange for an agreement not to challenge the damages award or otherwise appeal any matter pertaining to the issues covered by the remittitur offer.

Utah Foam Products Co. v. The Upjohn Company, 154 F.3d 1212, 1215-16 (10th Cir. 1998). The Court further stated that

> In short, the well-established rule is that acceptance of remittitur of damages effectively waives the right to appeal any issue pertaining to the causes of action covered by the remittitur offer.

Id. at 1216; see accord Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359 (9th Cir. 1990).

The decision to retry a matter or accept a remittitur was solely in the hands of appellee. Appellants could do nothing but wait for the decision of appellee as to the course that would be taken. Ultimately, appellee affirmatively chose to accept the remittitur of the negligence damages and not to retry that issue. However, by that choice there are some consequences, one of which is that the appeal of that issue is precluded.

In the present case, appellee was faced with a decision. Following a clearly excessive jury award, appellee chose to accept the remittitur, including the remittitur of the amount of negligence damages. By accepting the remittitur of the negligence award, appellee's appeal of the negligence remittitur is, therefore, barred.

CONCLUSION

Appellee was fraudulently induced into a good deal. When appellee learned of the wrongful inducement, it had the choice to rescind the deal or affirm the contract. It chose the later. And that was a smart choice, as appellee and appellants both know. Appellees got a good deal and kept it,

despite the wrongs committed by appellants in the process. Now in court, appellee wants more. Appellee wants the court to sanction that while keeping the office building, it can also seek damages that are not part of the negotiated and written contract that resulted in the acquisition of the building. The law should not be extended to allow such a double victory. Having made a choice to affirm the written contract and reap the benefit of the deal, the only consequences available must be found within the terms of the contract.

And should this Court find that a punitive award is still available, such an award must be both reasonably connected to the damages suffered, as well as calculated on the joint and several nature of the damages themselves. Otherwise we permit a flawed methodology that allows a party to artificially leverage a modest compensatory damage award to an aggregate punitive award thereby eviscerating the carefully delineated factors previously articulated by this Court.

Finally, because no appeal was taken over the negligence components of this case, as remitted by the trial court, appellee's do not have the right to challenge those findings here.

Life is not that disparate from the court system. Choices made by appellee and appellants have distinct and carefully determined consequences.

RESPECTFULLY SUBMITTED this 22nd day of October 2001.

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CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of October 2001, I mailed, postage prepaid, the foregoing **REPLY BRIEF OF APPELLANTS** to the following:

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